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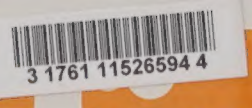

affirmation

Ontario Human Rights Commission

Volume 5, Number 4
December 1984

Published by The Ontario Human Rights Commission

First board decision on handicap

by Jill Armstrong

The first board of inquiry to be appointed under the new *Human Rights Code* recently heard a complaint alleging discrimination in employment because of handicap. It was also the first case under Ontario human rights legislation to deal with 'handicap' as a prohibited ground of discrimination.

Miller Services Ltd.

The complainant, Ms. Cameron, had a congenital malformation of the left hand, which resulted in three fingers being shorter than normal. She alleged that she was refused a position as a nurse's aide in the respondent nursing home because of her handicap.

Ms. Cameron testified that the assistant administrator of the nursing home had interviewed her and had indicated that there was an excellent chance she would be hired on the basis of her personal qualities and experience. The complainant was given a pre-employment medical examination form to be completed by her physician, who referred to her congenital defect, but stated that it did not diminish her ability to such a degree as to prevent the safe performance of her duties as a nurse's aide.

Testimony revealed that when the nursing home administrator became aware of Ms. Cameron's handicap, she told Ms. Cameron that she would not be hired because 'we could not take a chance on a resident being dropped.' It was clear to the board, however, that Ms. Cameron had informed the respondent that her previous jobs had required her to grip, lift and carry handicapped children, and she had not had any problems. Testimony also indicated that none of the nursing home officials had asked Ms. Cameron to demonstrate her ability to grasp in a simulated lifting situation.

An occupational therapist testified that she had performed a job demands/job performance analysis on the complainant and had found that Ms. Cameron could perform each task associated with the position in a very competent manner. A plastic surgeon specializing in congenital hand surgery testified that Ms. Cameron can compete as a nurse's aide on an equal level with any of her peers.

The board then addressed the question of the respondent's onus to establish that the complainant is incapable of performing or fulfilling the essential duties or requirements of the job because of handicap. This defence is provided under section 16(1)(b) of the Code. The board stated, 'good faith, or lack of malice or improper motive, is irrelevant to handicap situations. The defence has to be founded upon an objective basis.'

The board found that lifting patients is an essential aspect of the nurse's aide job function. 'However, it is also my view that it is not apparent to a reasonable observer that Ms. Cameron's handicap renders her incapable of performing the task of lifting in the job of nurse's aid . . . Under the circumstances, the respondent should have put Ms. Cameron to the test of a simulated exercise in lifting a patient.' The board concluded that the evidence clearly established that the complainant's handicap will not in any way restrict her in being able to lift nursing home patients.

Having found that discrimination had occurred, the board ordered the following:

> The respondent shall offer in writing to the complainant, employment in the position of

continued on page 2

Can the Code be applied to a Pre-Code Contract?

In a fascinating decision, Professor Frederick H. Zemans dealt with a case in which a contract was entered into between two parties before the new *Human Rights Code* was enacted, but in which the consequences of the contract were judged to fall under the provisions of the new Code.

At issue was a complaint made by Mr. Brian B. Hope against the Royal Insurance Company of Canada. Mr. Hope had an automobile insurance contract with the company and added his 16-year-old son as an insured driver. This cost him $86, a sum to which he objected because he said he was being discriminated against on the basis of his child's sex; he would have been charged less to cover a daughter of the same age. The respondent insurance company argued that when the contract was entered into the old *Ontario Human Rights Code* prevailed, and that, consequently, the new Code was inapplicable.

In his argument, Professor Zemans, acting as a board of inquiry, dealt with the concepts of retroactivity and retrospectivity. 'A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only . . . A retroactive statute operates backwards, a

continued on page 2

On December 10, 1984 we celebrate the 36th anniversary of the Universal Declaration of Human Rights

See Editorial on page 3.

Can the Code be applied...?
continued from page 1

retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it

that may cover the *consequences* of an act first entered into prior to the enactment of the Code? Does it, in other words, impose new results in respect of a past event? In the case at hand, do the discriminatory charges against a male driver continue to be *permissible even now*, when such charges might be prohibited by the new Code.

LeDain who, when sitting on the Federal Court of Appeal, said that an Act 'could have a retrospective application to discriminatory practices begun before the Act came into force, but continuing on or after that date.'

There were other reasons why Professor Zemans allowed the complaint to go forward and why he rejected,

Miller Services Ltd.

otherwise would be with respect to a prior event.'

The board of inquiry made it clear that the new *Human Rights Code* is not retroactive, that is, it states nowhere that it is to be interpreted as having been in place at a time previous to its enactment on June 15, 1982. In the western world retroactivity is generally considered a flagrant violation of natural justice, for it would deprive people of rights acquired by transactions perfectly valid and regular according to the law of the time.

But if retroactivity is ruled out, is there anything in the present Code

Professor Zemans ruled that 'the fact that the contract of insurance was entered into at some time prior to the enactment of the Code is of no consequence. It would offend good sense if any discriminatory act which surfaced after the proclamation of the present Code, but which was based on a relationship or status that preexisted the Code, could not be remedied by its application.' In other words, the contract, although entered into before the new Code was in effect, continued in operation after that date and was therefore subject to the new law.

He quoted Supreme Court Justice

in his preliminary decision, the respondent's application for dismissal of the case.

The respondent argued that Mr. Hope had no standing because 'family status' was, in the meaning of the Code, not applicable to the relationship of a father to his son. Professor Zemans interpreted the Code to permit such an interpretation of the term family status – a significant broadening of its meaning. At this writing the decision has been appealed, and will be watched with considerable interest.

First board decision
continued from page 1

nurse's aide at the nursing home, when the position next becomes available due to a vacancy, and the complainant shall have seven days after receipt of such offer of employment to accept the offer.

The respondents are jointly and severally liable to pay forthwith to the complainant, as follows:
- as damages for lost wages, the sum of $1,915.00;
- as general damages, the sum of $2,000.00; and
- as interest in respect of the awards of damages, the sum of $636.00.

The respondent shall cease and desist forthwith in discriminating because of handicap in the hiring of employees.

The respondent has filed a notice of appeal from the decision and order in the Supreme Court of Ontario, Divisional Court.

Jill Armstrong is manager of Program Review and Design, Ontario Human Rights Commission

Primacy

by Thea Herman

On June 15, 1984, two years after the new Ontario *Human Rights Code* became law, the Code obtained primacy over all other laws in the province. What this means is that where there is a conflict between the Code and another provision in Ontario statute or regulation, the Code governs. The one exception to this is where a law specifically states that it is to apply notwithstanding the *Human Rights Code*.

The reason for the two-year wait on the Code's primacy was to give the government an opportunity to review its laws in order to remove possible conflicts with the Code. This two-year period roughly corresponds to the three-year moratorium on the equality rights section of the Canadian Charter of Rights and Freedoms, which was imposed to give the federal government and provincial governments an opportunity to review legislation to ensure compliance with the Charter. The equality rights provision—section 15—is the non-discrimination section of the Charter, and becomes law on April 17, 1985.

Primacy is important not only because it extends the coverage of the Code, but also because it reflects the government's commitment to human rights and the principle that the rights provided in the Code stand supreme in the province of Ontario.

This view of human rights legislation was expressed by Mr. Justice Lamer of the Supreme Court of Canada in a case involving the *British Columbia Human Rights Code:*

> 'When the subject matter of a law is said to be the comprehensive statement of the 'human rights' of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others.'

Thea Herman is legal counsel to the Ontario Human Rights Commission.

Race Relations Consultative Committee on Education

by Ruth Schweitzer Rozenberg

Institutions such as the school system are very important in shaping the attitudes that affect race relations.

School children are a vast audience of 'passive listeners' ready to absorb what they are taught. After this educational process, the young peoples' minds, thoughts and attitudes are formed. Self-acceptance and acceptance of others enable them to live an integrated and full life.

The elimination of racism and discriminatory practices within the educational institutions is a major responsibility of the Race Relations Division. The division must therefore maintain a constant, close relationship with the key people in the education sector.

To this end, the Educational Consultative Committee, chaired by Dr. Bhausaheb Ubale, was formed almost a year ago and is supported by the

Cabinet Committee on Race Relations, chaired by The Honourable R. Roy McMurtry.

The consultative committee, made up of 16 members from around the province working at various levels within the education field, recognized five major issues that demanded immediate attention: assessing and streaming of immigrant and visible minority students; monitoring existing curricula for bias and developing bias-free curricula; developing race relations training for teachers and students; developing and implementing race relations policies and guidelines for handling racial incidents in the schools; and augmenting good school-community relations.

Two subcommittees have therefore been established to implement the two most pressing of these needs: assessing and streaming immigrant and visible minority students and developing race relations training for teachers and students. The three other issues will be addressed in the near future.

While teachers, education administrators, trustees and students have acknowledged that racism is not a myth but a reality in the schools, they have joined forces to do something about it through their policies and committees.

As the school population reflects the realities of Ontario's multiracial society, teachers require specialized knowledge and expertise to assist them to prepare students to live together in harmony.

Through this consultative process and by sharing its findings and procedures, racial harmony can be achieved.

Ruth Schweitzer Rozenberg is a human rights officer with the Race Relations Division of the Ontario Human Rights Commission.

Affirmation/Published quarterly by:
The Ontario Human Rights Commission

Editorial Office
c/o Ontario Human Rights Commission,
Queen's Park,
Toronto, Ontario M7A 1A2

ISSN 0228-5800

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Editorial

The universality of human rights

Every December we celebrate the anniversary of the Universal Declaration of Human Rights. The Declaration was adopted by the United Nations in 1948, and Canada became a signatory to it and the Conventions that flowed from it. The underlying axiom of the Declaration is that human beings have certain rights regardless of where they find themselves—simply because they are human.

The universal application of such rights is, perhaps, best demonstrated in the case of refugees. While, strictly speaking, their status is determined by federal statute and regulation (and because Canada is signatory to the UN Convention), their rights derive essentially from their humanity—and this principle is, of course, applicable as well to Ontario and its legislation.

A person might come to Canada quite illegally—without a passport or visa or other proper papers. If such a person claims refugee status, then the determination of whether this person may or may not remain in Canada is entirely independent of the legality or illegality of his or her status. Such a person has the full protection of the law, including all appeals up to the Supreme Court of Canada. The recognition of a person's humanity is thus a potent acknowledgement by Canada of its adherence to the basic principles of the Universal Declaration.

(Rabbi Plaut, editor of Affirmation, was appointed this year to re-examine and redress the refugee determination process in Canada).

Mailbag

To the Human Rights Commission:

Officer Fiona Crean recently investigated a complaint which I (with the help of my lawyer) registered.

I would like you to know that I appreciate very much the considerable amount of effort Fiona put out on my behalf. I was under a great deal of stress and tension, and her consistent support encouraged me not to give up.

I recommend her for her perceptiveness and analytical skills. Her warmth, concern, sincerity, and sense of humour made it a pleasure to have her as my worker.

I am pleased that you have someone with these qualities working for your Commission.

Yours truly,
M.D.

Dear Chairman Purcell:

This letter is to inform you that the matter concerning the suspension of my son who attends the Collegiate and Vocational Institute here has been successfully and amicably resolved at the office of the Human Rights Commission, at 2500 Lawrence Avenue East.

May I say thank God for venerable organs of justice such as yours, without which I shudder to think how much injustice would have gone unchallenged and unchecked.

I would also like you to know that Mr. Glen Morrison, the officer who conducted the investigation and effected the settlement, is a model representative of the Commission. Mr. Morrison particularly impressed me (and I believe the respondent also, who likewise expressed gratitude to him) with his conciliatory attitude, impartiality, diligence, probing fact-finding questions, understanding of the focal issue and its social implications, and with his urbane, friendly manner. In short, Mr. Morrison showed himself not only to be a good professional projecting a very positive image of the Commission, but also a fine gentleman.

Thank God for your Commission and the work that you and your staff are doing.

Dear Borden:

We recently ran, with the assistance of Walter Burns, London Human Rights Officer, a series of eight, half-day seminars, for all London Board personnel (Principals, Vice-principals, Coordinators, Consultants, Managers and Supervisors) who, during the course of their duties, act as hiring agents of the Board. The purpose of the exercise was to raise the awareness level of our personnel to the Human Rights Code and the implications of the Code on the hiring process. A total of 210 persons attended over the course of four days. Walter was assisted by Ann Carrick, Dorothy Barnes and Greg Lawrence.

All reports from the participants suggest the sessions were well received and certainly went a long way to raise the awareness level of our personnel. The number of hours for preparation and presentation certainly was taxing to your officers and we are appreciative of the extra demands our request for assistance placed on your staff. We have expressed our appreciation to them personally, and wanted to make you aware of their extra efforts.

In today's society we are all too ready to criticize and very short on praise. It is with the latter in mind that we write.

Yours truly,
John W. Neal
Personnel Officer
Human Resources Department
Board of Education for
the City of London

Chairman's corner

One of the highlights of this issue of *Affirmation* is a summary of the first board of inquiry decision rendered under the ground of handicap.

In fiscal year 1983/84 the commission received a total of 290 complaints based on handicap, an increase of 134 per cent over last year, representing the largest percentage of our caseload and the fastest growing area of complaint since the proclamation of the new *Code*. Two hundred and forty-two of these were in the area of employment. The concerns and issues presented by the nature and number of these complaints and by the board decision give rise to considerable thought with regard to the philosophical and pragmatic considerations inherent in our human rights legislation.

The *Human Rights Code*, which, as of June 15, 1984, has primacy over all other relevant provincial legislation in Ontario (except where a law specifically states that it is to apply notwithstanding the *Human Rights Code*), and the Ontario Human Rights Commission are dedicated to two overriding objectives: to make secure in law the inalienable rights of every person in this province and to create a climate of understanding and mutual respect among all people so that each and every one of us will be afforded equal opportunity to contribute both to our personal fulfilment and to the economic and social enrichment of the whole community.

We believe that human rights is a skilful blending of education and legal techniques in the pursuit of social justice. But legal complexities must not override the element of humanity. The intent of the legislation relies on the *reasonableness* of all of us in preserving the human dignity of each person.

Unfortunately, many of the complaints on the ground of handicap filed with the commission, as evidenced in the board decision, reflected a stereotypical prejudgement on the part of the employer with respect to limitations that may arise from people with real or perceived handicaps.

These preconceived attitudes must be changed. Society's duty is to have disabled persons perceived as people, not as their disabilities. Disabled people should be allowed to follow the same two basic career principles accorded everyone else: the right to choose from a wide range of personally meaningful work opportunities and the right to emphasize accomplishments and talents, rather than limitations.

As I go around and talk to employers, I hear how committed thay are to disabled people. 'Charlie Smith', who has been an excellent employee for 20 years, has an accident. The company will do everything it can to accommodate Charlie and to keep him as a valued employee. When his employers look at Charlie, they don't see his disability, they see his talents, his loyalty, his diligence.

But what about 'Harry Brown', the person with a handicap who comes in for an interview? This time all that is seen is the handicap and all the difficulties that the employer fears and anticipates encountering. Yet Harry has the same ability and motivation as Charlie to prove his worth and to make a contribution to the company.

With the right to equal treatment comes, in turn, the responsibility inherent in this right: to be qualified for the job and to be capable of performing it.

It should be made clear that the commission believes in the merit principle. It is not considered a contravention of the Code to deny someone a job if that person's handicap makes him or her unable to perform the essential duties required of the position—the central aspects of the job. The Code is designed to protect capable disabled people who *can* perform the jobs despite their handicap. Our task at the commission is to ensure that no 'unnecessary' obstacles are placed in the way of people in their quest for full participation and equality of opportunity.

In practical terms, we weigh what we call 'reasonable accommodation' against what we call 'undue hardship'. Take a qualified bookkeeper who uses a wheelchair to get around. Take a business that needs a bookkeeper, but whose accounting office is on the other side of a high step. Add a ramp and you have reasonable accommodation. A ramp?—yes. Installation of an elevator?—probably not.

People with disabilities share the universal need to attain the ideal balance between autonomy and integration with the daily life of the community and the workplace. Their effort to form social relationships, develop social and vocational skills and to confirm and increase their social and economic status should not be thwarted.

In our consideration of the rights of individuals, we are equally and ever mindful of how they may affect the rights of others. The individual's right to freedom must be exercised in the context of his or her responsibility to the community of which he or she is a part.

It takes courage to live with, and overcome, limitations and disabilities. All that is asked is the chance to allow that courage to manifest itself.

Full participation and equal opportunity for those with disabilities are a new frontier, and one in which we all have a large part to play. The Ontario Human Rights Commission, in performing its role, has the legislation and the commitment of government public policy behind it. It has the legal expertise to advise and support it, but the human element has always been, and will continue to be, its first priority.

Borden C. Purcell,
Chairman,
Human Rights Commission

Les francophones et leurs droits

par Francine Lecours

Les membres du personnel de la Commission ontarienne des droits de la personne, dans leur souci de rejoindre tous les secteurs de la société, travaillent fréquemment avec des groupes spécifiques (groupes ethniques, employeurs, syndicats etc..) afin d'échanger avec eux sur les droits de la personne. La communauté francophone, bien que non homogène, représente toutefois aux dires de plusieurs une population distincte avec une perception spécifique de ses droits et de ses attentes vis à vis la Commission, ce qui au même titre que tout autre groupe lui confère pour nous les attributions d'une population cible à rejoindre. C'est précisément ce que la Commission tente de faire depuis quelques années, afin d'informer et de sensibiliser les franco-ontariens à l'existence du Code ontarien des droits de la personne dans un premier temps et d'évaluer leurs besoins dans un deuxième temps. Nos recherches effectuées dans la région du Toronto métropolitain, bien que non exhaustives, nous ont instruits en bien des manières.

Mentionnons tout d'abord que la majorité des francophones avec qui nous avons été en contact s'accordent pour dire que les franco-ontariens n'etant pas regroupés géographiquement, toute forme d'organisation dans un but revendicatif ou autre devient malaisée. On a peine à rejoindre cette population non seulement parce qu'elle est dispersée, mais aussi parce qu'elle n'est pas toujours facilement identifiable (bilingue en majeure partie), ce qui augmente en difficultés.

En ce qui concerne les vues des francophones interrogés sur la législation provinciale des droits de la personne, voici ce qui ressort globalement de nos rencontres. En premier lieu, la langue devrait, selon plusieurs personnes, être considérée comme un motif de discrimination par le Code ontarien de droits de la personne. Il s'agit d'une question soulevée depuis longtemps et qui continuera sûrement à être discutée à la Commission. De plus, le Code serait beaucoup trop général en ce qu'il ne fait aucune référence directe aux francophones "comme deuxième peuple fondateur", ce qui rejoint la question de la reconnaissance des deux langues officielles en Ontario. A ce sujet, précisons que même s'il ne s'agit pas d'un domaine protégé par le Code, la Commission a déjà accepté et continuera à accepter les plaintes alléguant une situation discriminatoire sur la base de la langue lorsqu'il peut être démontré que cela réfère directement ou indirectement aux origines ethniques ou ancestrales.

Considérant les droits humains sous un point de vue plus général, les francophones rencontrés ont exprimé leurs opinions principalement face à deux questions. En premier lieu, on souhaiterait voir la Commission prendre des mesures concrètes (dénonciations publiques par exemple) vis à vis les groupes qui par leurs discours ou leurs écrits expriment des opinions haineuses face à un groupe ethnique ou linguistique (notamment les francophones).

La seconde suggestion concerne les services en français qui aux dires de plusieurs devraient être améliorés dans certains établissements et institutions. On mentionnais notamment les hôpitaux, les cliniques psychiatriques, les centres de main—d'oeuvre et les services d'immigration. Malgré le fait que certains d'entre eux prétendent offrir des services bilingues, il semble que des problèmes persistent pour qui veut s'adresser à l'un ou l'autre de ces établissements en français. Conséquemment il serait important de bien définir ce qu'on entend par services en français du point du vue organisationnel. La population ontarienne a été témoin ces dernières années de la volonté du gouvernement Davis de travailler à la reconnaissance des droits des francophones de même qu'à l'augmentation des services en français dans plusieurs secteurs de l'administration publique provinciale, des services sociaux, du système d'éducation et du système judiciaire. En procédant de cette façon, la communauté réalise que la législation sur les langues minoritaires ne représente aucune menace et ne crée aucune peur. Néanmoins aux dires mêmes du premier ministre de la province, il s'agit d'un processus progressif qui requière la patience de tous, afin que tout changement concret concernant la question de la langue survienne suite à un concensus établi. Cette approche reflète un engagement conforme à des traditions politiques d'amélioration perpétuelle et de dynanisme.

Enfin considérant que l'unanimité n'est jamais chose facile à réaliser, la communauté francophone ne fait pas exception à la règle en ce qui regarde la question de la protection de ses droits. Aussi devons-nous rapporter les opinions des personnes pour qui les droits des franco-ontariens ne font aucun problème et qui sont satisfaites de la situation actuelle.

La Commission ontarienne des droits de la personne entend bien poursuivre ses contacts avec la population francophone de façon de plus en plus continue. Vos articles pour *Affirmation* sont donc les bienvenus car nous comptons sur la coopération des milieux francophones afin qu'ensemble nous puissions travailler au mieux-être de cette communauté.

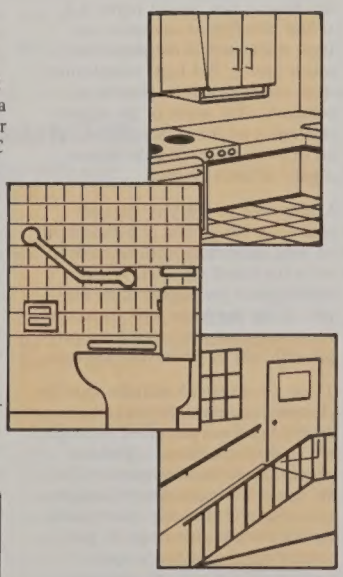
Francine Lecours, était une étudiant Québecoise un échange avec La Commission Ontarienne des droits de la personne pendant l'été 1984.

Funding for residential accessibility now available

The federal government has instituted a Residential Rehabilitation Assistance Program (RRAP) to be administered by the Canada Mortgage and Housing Corporation, which is designed to assist homeowners and landlords who want to make their property accessible to a disabled occupant. Up to $13,000 per unit are available through the CMHC for a combination of basic structural improvements and alterations geared to the specific needs of disabled residents. Up to $6,500 may not have to be repaid, depending on the borrower's household income.

This is an ongoing program with no time limit.

For more information, contact your municipality, RRAP delivery agent or local Canada Mortgage and Housing Corporation (CMHC) office.



Systemic discrimination and affirmative action

The rationale for special programs is more readily understood if such programs are viewed as a remedy for systemic discrimination, which is prohibited under section 10 of the Code. The concept of systemic discrimination refers to those employment practices, policies and requirements which, while they may appear to apply equally to all, have an adverse or discriminatory impact on members of particular groups. For the most part, systemic discrimination results from a complex interaction of seemingly neutral practices that have long affected the employment and vocational opportunities of minorities, women and persons with handicaps.

Systemic discrimination manifests itself in a complex interaction of attitudes and actions of individuals, organizations and the network of institutional structures that make up our society. Systemic discrimination represents the self-sustaining and self-perpetuating discriminatory processes that occur in employment, education, vocational training, housing and access to goods, services and facilities.

Discriminatory actions by individuals and organizations are not only pervasive, occurring in every sector of society, but also cumulative, with effects limited neither to the time nor to the particular structural area in which they occur. The process of discrimination, therefore, extends across generations, across organizations and across social structures in self-reinforcing cycles, passing the disadvantages incurred by one generation in one area to future generations in many related areas.

The concept of systemic discrimination was judicially defined by the Supreme Court of the United States in Griggs v. The Duke Power Co. (401 U.S. 424,1971). The court identified the following elements of systemic discrimination:

- The thrust of human rights legislation is directed to the consequences of employment practices or requirements and not simply to the motivation behind them.
- Human rights legislation proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation.
- If the practice has an adverse impact on minorities or women, it can be justified only by showing that it is necessary to the safe and efficient operation of the business.
- Moreover, there must be available no acceptable alternative policies or practices to the practice in question that would better accomplish the business purpose advanced, or accomplish it equally well with a lesser discriminatory effect.